

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

07 JAN 10 10 31 AM  
REGIONAL HEARING CLERK  
EPA REGION VI

IN THE MATTER OF: ) DOCKET No. TSCA-06-2006-6074  
)  
Mountainair School District ) COMPLAINT  
Mountainair, New Mexico ) AND  
) NOTICE OF  
) OPPORTUNITY FOR HEARING  
RESPONDENT )

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**SECTION I**  
**PRELIMINARY STATEMENT**

This Complaint and Notice of Opportunity for Hearing (Complaint) is issued pursuant to Section 207(a) of the Toxic Substances Control Act, as amended (TSCA or the Act), 15 U.S.C. § 2647(a), enacted as a section of Title II of TSCA, known as the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2641 et seq. The Complainant in this action is the Director, Compliance Assurance and Enforcement Division, United States Environmental Protection Agency (EPA) Region 6, who is the person to whom the authority has been delegated to issue such Complaints in the states of Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

Complainant will show that Mountainair School District, Mountainair, New Mexico (Respondent) violated TSCA and the regulations promulgated pursuant to TSCA.

**SECTION II**  
**ALLEGATIONS**

1. Respondent is Mountainair School District, a local educational agency in Mountainair, New Mexico that is operated for the education of students in K - grade 12.

2. The term "local educational agency" (LEA) means any local educational agency as defined in Section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 3381), Section 202(7) of TSCA, 15 U.S.C. § 2642(7), and 40 C.F.R. § 763.83.

3. Respondent is a "local educational agency" as defined in Section 202(7) of TSCA, 15 U.S.C. § 2642(7), and 40 C.F.R. § 763.83, and as such is subject to Section 203 of the Act and the regulations at 40 C.F.R. Part 763.

4. The term "school building" means any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food, a gymnasium, any facility which is specially designed for athletic or recreational activities for an academic course in physical education, a facility used for the instruction of students or for the administration of educational or research programs, maintenance, storage, or utility facility, including hallways, essential to the operation of any facility as defined at Section 202(13) of TSCA, 15 U.S.C. § 2642(13), and 40 C.F.R. § 763.83.

5. Respondent operates Mountainair Elementary School, and Mountainair High School as school buildings which have one or more structures suitable for use as a classroom, library, school eating facility and/or gymnasium.

6. Respondent operates a "school building" as defined at Section 202(13) of TSCA, 15 U.S.C. § 2642(13), and 40 C.F.R. § 763.83.

7. Respondent is subject to Section 203 of TSCA, 15 U.S.C. § 2643, and 40 C.F.R. Part 763.

8. On April 26, 2006, Respondent's schools were inspected by EPA pursuant to Section 11 of Title 1 of the Act, 15 U.S.C. § 2610, to ensure compliance with the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E.

9. Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), provides that any local educational agency which fails to develop a management plan pursuant to regulations under Section 2643(i) or 2644(d) of this title, is liable for a civil penalty of not more than \$5,000 for each day during which the violation continues. Failure to comply with the statute and/or regulations at a single school building is a violation.

**COUNT I - FAILURE TO MAINTAIN AN ASBESTOS MANAGEMENT PLAN IN THE ADMINISTRATIVE OFFICE OF MOUNTAINAIR ELEMENTARY SCHOOL, PURSUANT TO SECTION 203(i) OF TSCA, (15 U.S.C. § 2643(i)(5)) AND 40 C.F.R. § 763.93(g)(3)**

10. Paragraphs 1 - 9 above are hereby realleged and incorporated by reference.

11. Section 203(i)(5) of TSCA, 15 U.S.C. § 2643(i)(5), requires a copy of the management plan to be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents.

12. 40 C.F.R. § 763.93(g)(3) requires local educational agencies to maintain a complete, updated copy of the management plan in the administrative office of each school and available for inspection by representatives of EPA and the State, the public, including teachers, other school personnel and their representatives, and parents.

13. On April 26, 2006, a representative of the EPA conducted an inspection of Mountainair Elementary School to determine Respondent's compliance with the requirements of the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E.

14. During the inspection, the EPA representative discovered that a complete, updated copy of the management plan was missing from the school's administrative office and unavailable for review.

15. Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), provides that any local educational agency which fails to develop a management plan pursuant to regulations under Section 2643(i) or 2644(d) of this title, is liable for a civil penalty of not more than \$5,000 for each day during which the violation continues. Failure to comply with the statute and/or regulations at as single school building is a violation.

**COUNT II - FAILURE TO MAINTAIN AN ASBESTOS MANAGEMENT PLAN IN THE ADMINISTRATIVE OFFICE OF MOUNTAINAIR HIGH SCHOOL, PURSUANT TO SECTION 203(i) OF TSCA, (15 U.S.C. § 2643(i)(5)) AND 40 C.F.R. § 763.93(g)(3)**

16. Paragraphs 1 - 9 above are hereby realleged and incorporated by reference.

17. Section 203(i)(5) of TSCA, 15 U.S.C. § 2643(i)(5), requires a copy of the management plan to be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents.

18. 40 C.F.R. § 763.93(g)(3) requires local educational agencies to maintain a complete, updated copy of the management plan in the administrative office of each school and available for inspection by representatives of EPA and the State, the public, including teachers, other school personnel and their representatives, and parents.

19. On April 26, 2006, a representative of the EPA conducted an inspection of Mountainair High School to determine Respondent's compliance with the requirements of the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E.

20. During the inspection, the EPA representative discovered that a complete, updated copy of the management plan was missing from the administrative office of the school and unavailable for review.

21. Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), provides that any local educational agency which fails to develop a management plan pursuant to regulations under Section 2643(i) or 2644(d) of this title, is liable for a civil penalty of not more than \$5,000 for each day during which the violation continues. Failure to comply with the statute and/or regulations at as single school building is a violation.

**COUNT III - FAILURE TO MAINTAIN AN ASBESTOS MANAGEMENT PLAN  
IN THE ADMINISTRATIVE OFFICE OF MOUNTAINAIR SCHOOL DISTRICT,  
PURSUANT TO SECTION 203(i) OF TSCA, (15 U.S.C. § 2643(i)(5)) AND  
40 C.F.R. § 763.93(g)(2)**

22. Paragraphs 1 - 9 above are hereby realleged and incorporated by reference.

23. Section 203(i)(5) of TSCA, 15 U.S.C. § 2643(i)(5), requires a copy of the management plan to be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents.

24. 40 C.F.R. § 763.93(g)(2) requires local educational agencies to maintain in their administrative office a complete, updated copy of a management plan for each school under their administrative control and available for inspection by EPA and the State, the public, including teachers, other school personnel and their representatives, and parents.

25. On April 25, 2006, a representative of the EPA conducted an inspection of Respondent to determine compliance with the requirements of the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E.

26. During the inspection, the EPA representative discovered that a complete, updated copy of a management plan for each school under its administrative control or direction was missing from the Respondent's administrative office and unavailable for review.

27. Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), provides that any local educational agency which fails to develop a management plan pursuant to regulations under Section 2643(i) or 2644(d) of this title, is liable for a civil penalty of not more than \$5,000 for each day during which the violation continues. Failure to comply with the statute and/or regulations at a single school building is a violation.

**SECTION III**  
**PROPOSED CIVIL PENALTIES**

Section 207(a) of TSCA, 15 U.S.C. § 2647(a) and 40 C.F.R. § 763.97(a)(2) authorize a civil penalty of up to \$5,000 per day for each violation of TSCA. Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Parts 19 and 27, penalties up to \$6,500 per day for each violation of Section 207 of TSCA may be assessed for violations that occur on or after March 15, 2004 (69 Fed. Reg. 7121 dated February 13, 2004). Based on the foregoing allegations and pursuant to the authority of Section 207(a) of TSCA, Complainant proposes to assess a civil penalty against Respondent in the amount of two thousand six hundred and seventy-five dollars (\$2,675.00) for the violations alleged in this Complaint. Complainant's calculation of the proposed penalty is based upon the facts stated in the Complaint, and on the nature, circumstances, extent and gravity of the above-cited violations and in accordance with the Interim Final Enforcement Response Policy (ERP), for the Asbestos Hazard Emergency Response Act (dated 1/31/89), a copy of which is enclosed with this Complaint, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 C.F.R. Part 22). In calculating the penalty, Complainant took into consideration the factors listed in Section 207(c)(1) of TSCA, 15 U.S.C.

§ 2647(c)(1): the significance of the violation; the culpability of the violator, including any previous violations of TSCA; the ability of the violator to pay the penalty; and the ability of the violator to continue providing educational services to the community.

The following is a summary of the violations cited, the extent of the violations (amount of substance involved in the violations), the circumstance level (potential for harm), and the proposed penalty based upon the AHERA Enforcement Response Policy:

|  | Extent      | Circumstance Level | Penalty   |
|--|-------------|--------------------|-----------|
| <u>Count I</u> - Failure to maintain a management plan in the administrative office of Mountainair Elementary School | Significant | 3                  | \$836.00  |
| <u>Count II</u> - Failure to maintain a management plan in the administrative office of Mountainair High School      | Significant | 3                  | \$836.00  |
| <u>Count III</u> - Failure to maintain management plans in the administrative office of Mountainair School District  | Significant | 2                  | \$1003.00 |

The proposed penalty of \$2,675.00 is based on factors listed in Section 207(c)(1) of TSCA, 15 U.S.C. § 2647(c)(1). Additionally, during settlement negotiations, the proposed penalty may be further reduced based on the costs expended by Respondent in correcting the

violations identified in this Complaint, and for complying with the Asbestos-Containing Materials in Schools Rule. Respondent shall provide compliance documents to:

Elvia E. Evering  
Air/Toxics & Inspection  
Coordination Branch (6EN-A)  
U.S. EPA - Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

**SECTION IV**  
**NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

As provided in Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), you (the Respondent) have the right to request a hearing as described at 40 C.F.R. § 22.14(a)(6) to contest any material fact contained in the Complaint or the appropriateness of the proposed penalty. If you wish to avoid being found in default, you must file a written answer and if you so desire, a request for a hearing with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, within thirty (30) days of service of this Complaint. As set forth in 40 C.F.R. § 22.15(b) this answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which you have any knowledge, or shall clearly state that you have no knowledge as to the particular factual allegations in the Complaint. The answer to the Complaint shall also state:

- a. The circumstances or arguments which are alleged to constitute the grounds of defense; and
- b. The facts which you intend to place at issue.

The denial of any material fact or the raising of any affirmative defense shall be construed as a request for a hearing. Failure to deny any of the factual allegations in the Complaint constitutes an admission of such allegations.

Any hearing that you request shall be held and conducted in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits" (40 C.F.R. Part 22).

As indicated in 40 C.F.R. § 22.17, if you fail to file a written answer within thirty (30) days of service of this Complaint, you may be deemed to have admitted all allegations made in the Complaint and waived your right to a hearing under TSCA. A Default Order may thereafter be issued by the Presiding Officer, and the civil penalty proposed herein shall become due and payable without further proceedings sixty (60) days after a Final Default Order is issued. Upon issuance of the Final Default Order, the Respondent must immediately comply with the Order provisions in the Complaint.

#### **SECTION V** **SETTLEMENT CONFERENCE**

Whether or not you request a hearing under 40 C.F.R. § 22.18, you may request an informal conference in order to discuss the facts of this case and to arrive at settlement. To request a settlement conference, write to Elvia E. Evering, Air/Toxics & Inspection Coordination Branch (6EN-A), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, or by phone at (214) 665-7575.

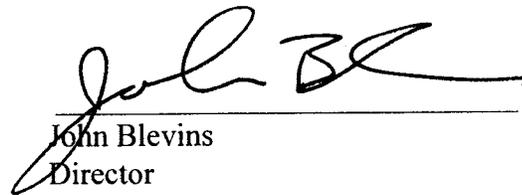
Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which you must submit a written answer and if you so desire, a request for a hearing. The informal conference procedure may be pursued as an alternative to, and simultaneously with, the adjudicatory hearing procedure.

EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Please be advised that no penalty reduction will be made simply because such a conference is held. As set forth in 40 C.F.R. § 22.18, any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement signed by the parties and their representatives and a Final Order issued by the Regional Administrator, U.S. Environmental Protection Agency, Region 6. The issuance of such Consent Agreement and Final Order shall constitute a waiver of your right to request a hearing on any matter stipulated to therein.

If you have neither effected a settlement by informal conference, nor requested a hearing within the thirty (30) day time period allowed by this Notice of Opportunity for Hearing, the above penalty may be assessed without further proceedings, in which case you will be notified that the penalty has become due and payable without further proceedings sixty (60) days after a Final Default Order is issued.

Date: \_\_\_\_\_

7/16/06



John Blevins

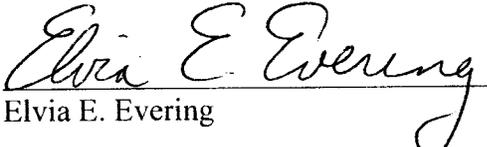
Director

Compliance Assurance and  
Enforcement Division

**CERTIFICATE OF SERVICE**

I certify that the original and one true and correct copy of the foregoing Complaint were hand-delivered to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and a true and correct copy was mailed by certified mail, return receipt requested, to Mr. D. Jay Mortensen, Superintendent, Mountainair School District, 512 North Ross, Mountainair, New Mexico 87036-0456.

Date: JAN 09 2007

  
Elvia E. Evering